

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 17, 2017

Dear Law Enforcement Leaders,

Thank you for the important work you do every day to protect our communities. Your jobs have never been more difficult, and as Attorney General, I want to do everything I can to support your efforts and ensure that you have the resources you need to keep yourselves and families across New Mexico safe.

As chief law enforcement officer for the State and Chairman of the Law Enforcement Academy Board (LEAB), I am committed to honoring your leadership in advancing important public safety issues that impact both you and those you serve. In pursuit of this goal, a subcommittee of the LEAB participated in an administrative review of the policies and procedures used by law enforcement agencies across the state to respond to officer-involved shootings. Understanding how your agencies deal with the aftermath of these critical incidents is the first step toward providing you as officers and law enforcement leaders with the tools you need to handle these difficult situations.

Your input is essential and I encourage you to review the subcommittee's draft report and provide feedback prior to the September 12, 2017 LEAB meeting. Comments on the report should be directed to monica.medrano@state.nm.us. My hope is that this will be just one element of an ongoing dialogue about the ways in which my office and the LEAB can support the work you do and help leverage resources in your favor.

Sincerely,

A handwritten signature in black ink, appearing to read "Hector H. Balderas".

Hector H. Balderas
ATTORNEY GENERAL

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DISCUSSION DRAFT

Law Enforcement Academy Board Subcommittee Report:

Best Practice Recommendations for New Mexico Law Enforcement Agencies

Handling Officer-Involved Shootings

Presented to the Law Enforcement Academy Board June, 2017

Subcommittee Members:

Kelly Burnham, Citizen Member

Elisabeth Miller, PhD, Citizen Member

Chief Pete Kassetas, New Mexico State Police

Chief Darren Soland, Navajo Department of Public Safety

I. Introduction:

Officer-involved shootings have risen to the top of both the national and state agendas, becoming an issue of considerable significance in New Mexico after a number of controversial police shootings occurred starting in 2014. What unfolded in the aftermath of these incidents highlights the immense impact officer-involved shootings can have on a community. Further, they shed light on the critical need for standardized guidelines and processes related to use of force by law enforcement officers, and the handling of investigations of officer-involved shootings. On this important matter, the President's Task Force on 21st Century Policing (2015) asserts that “[l]aw enforcement agencies should promote safety and wellness at every level of the organization...[officer-involved shootings and other use of force incidents] affect all law enforcement professionals, regardless of their management status, duty, or tenure” (p. 65)

Law enforcement officers in New Mexico face a unique set of challenges on a daily basis. While carrying out their lawful duties, law enforcement officers must frequently make difficult, split second decisions related to their use of deadly force. When an officer uses deadly force, the incident's impact is often far-reaching, touching not only the individuals directly involved, but also their families, their agency, and members of the community in which the incident occurs.

The New Mexico Law Enforcement Academy Board (LEAB) is responsible for promulgating training standards for all law enforcement officers and telecommunicators in the state. The LEAB is committed to remaining responsive to emergent public safety issues and to ensuring that New Mexico law enforcement officers receive effective, up-to-date training. To that end, in December of 2016, recognizing the need to proactively address the issue of officer involved shootings, the Chair of the LEAB, Attorney General Hector Balderas, appointed a subcommittee to undertake a comprehensive review of the policies and procedures utilized by law enforcement agencies across the state related to their handling of officer-involved shootings and other use of force incidents (Subcommittee).

This report details the findings of the Subcommittee's review and provides a series of recommendations for law enforcement agencies to consider utilizing in responding to officer-involved shootings and other use of force incidents in order to achieve consistency, thoroughness, and an appropriate degree of transparency.

II. Review Process

During the December 5, 2016 LEAB meeting, the Chairman of the Board appointed the following Board members to serve on the Subcommittee: Ms. Kelly Burnham (citizen board member), Dr. Elisabeth Miller (citizen board member), Chief Pete

Kassetas (New Mexico State Police), and Chief Darren Soland (Navajo Department of Public Safety). The Subcommittee sent an initial letter of inquiry to every New Mexico law enforcement agency in the state, requesting copies of the policies and procedures governing each agency's handling of officer-involved shootings and other use of force incidents. Copies of all communications sent to agencies are appended to this report for reference (Page 12).

III. Methodology

Throughout its review, the Subcommittee relied heavily upon pertinent case law along with peer-reviewed research related to law enforcement training and response to officer-involved shootings. Additionally, the Subcommittee relied upon federal guidance provided by President Obama's Task Force of 21st Century Policing (2015), as well as recommendations released by the International Association of Chiefs of Police (IACP) (2016). These generally accepted recommendations, promulgated by experts in the fields of both law and law enforcement, provide the basis of the recommendations set forth in this report.

Subcommittee members reviewed policies and procedures from all responsive law enforcement agencies with an eye toward identifying and analyzing a predetermined set of policy elements—all of which are the primary focus of model policies endorsed by entities like the President's Task Force and IACP. These elements fall into three distinct categories: pre-incident training and education; protocol during and immediately following an officer-involved shooting or other use-of-force incident; and procedures utilized during the post-incident investigation and related to the ultimate case disposition.

The Subcommittee met a total of three times either telephonically or in person throughout the course of the review period: February 10, 2017; March 7, 2017; and May 10, 2017. Members were each tasked with reviewing policies and procedures submitted by agencies, familiarizing themselves with recommendations offered by IACP and the President's Task Force, agreeing upon focus areas for the Subcommittee, and providing substantive feedback during the report drafting process.

IV. Results from Request for Information

The Subcommittee sent inquiry letters to a total of 142 law enforcement agencies and received policies and procedures from 85. The following agencies provided materials for the Subcommittee to review:

Albuquerque Police Department
Albuquerque Public Schools Police
Department
Artesia Police Department
Aztec Police Department
Belen Police Department

Bernalillo County Sheriff's Office
Bernalillo Police Department
Bloomfield Police Department
BNSF Railroad Police Department
Capitan Police Department
Carizozo Police Department

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City of Anthony Police Department
Clayton Police Department
Cloudcroft Police Department
Clovis Police Department
Corrales Police Department
Cuba Police Department
Curry County Sheriff's Office
Deming Police Department
Dexter Department of Public Safety
Doña Ana County Sheriff's Office
Eastern New Mexico University
Police Department
Eddy County Sheriff's Office
Fort Sumner Police Department
Gallup Police Department
Grant County Sheriff's Office
Hatch Police Department
Hidalgo County Sheriff's Office
Hobbs Police Department
Hurley Police Department
Jal Police Department
Las Cruces Police Department
Las Vegas Police Department
Lea County Sheriff's Office
Lincoln County Sheriff's Office
Logan Police Department
Lordsburg Police Department
Los Alamos County Sheriff's Office
Los Alamos Police Department
Los Lunas Police Department
Lovington Police Department
Luna County Sheriff's Office
Magdalena Marshal's Office
Melrose Marshal's Office
Mesilla Marshal's Office
Milan Police Department
Mora County Sheriff's Office
Moriarty Police Department
New Mexico Military Institute Police
Department
New Mexico Office of the Attorney
General
New Mexico State Police
New Mexico State University Police
Department
Otero County Sheriff's Office
Portales Police Department
Pueblo of Laguna Police Department
Quay County Sheriff's Office
Questa Police Department
Ramah Navajo Department of Public
Safety
Raton Police Department
Red River Marshal's Office
Rio Arriba County Sheriff's Office
Rio Rancho Police Department
Roosevelt County Sheriff's Office
Roswell Police Department
Ruidoso Police Department
San Juan County Sheriff's Office
San Miguel County Sheriff's Office
San Ysidro Marshal's Office
Sandoval County Sheriff's Office
Santa Clara Police Department
Santa Clara Tribal Police
Department
Santa Fe County Sheriff's Office
Santa Fe Police Department
Santa Rosa Police Department
Sierra County Sheriff's Office
Silver City Police Department
Socorro County Sheriff's Office
Sunland Park Police Department
Taos County Sheriff's Office
Taos Ski Valley Department of
Public Safety
Tatum Police Department
Texico Police Department
Tucumcari Police Department
University of New Mexico Police
Department
Valencia County Sheriff's Office
Zuni Police Department

Due to the time of year during which the Subcommittee requested information, a number of agencies were undergoing transitions in leadership. As a result, some agency heads indicated that they were in the process of reviewing and revising policies and procedures. Additionally, of the responsive agencies, more than one are tribal entities that adhere to Bureau of Indian Affairs (BIA) protocols when responding to officer-involved shootings. Although the Subcommittee reviewed materials from these agencies, it does not provide commentary or feedback on federal policies in this report.

V. Best Practice Recommendations

Existing scholarly research establishes that multiple factors at the individual, agency, and community levels, respectively, can impact the frequency with which officer-involved shootings occur (Jacobs and O'Brien 1998 and Smith 2003). The Subcommittee recognizes the complexity of this issue, and for the purposes of this review, chooses to focus on the relatively narrow element of agency policies and procedures. Although not all-encompassing, policies and procedures are a critical component of the broader conversation around how to address this issue, and fall in line with the Board's jurisdiction as the state's authority on law enforcement training standards and officer discipline.

A study examining criminal justice reforms during the latter half of the 20th century "finds that agency policies aimed at controlling the discretion of police officers can significantly reduce instances of officer-involved shootings" (Jennings and Rubado, 2017, p. 219). Therefore, the Subcommittee is hopeful that law enforcement agencies across the state will take the opportunity to review and revise policies and procedures if and where necessary in order to position themselves in the best way possible to handle officer-involved shootings and other use of force incidents, should they occur.

Although a great deal of work has already been done at the national level by reputable organizations related to the development of model policies to respond to officer-involved shootings, the Subcommittee recognizes the unique challenges faced by law enforcement agencies in New Mexico. Many New Mexico law enforcement agencies are located in rural areas and do not have the resources available to implement certain generally accepted practices that may work in more resourced, urban locations. The Subcommittee acknowledges the circumstances under which New Mexico law enforcement agencies function and has endeavored to be mindful of this fact, adapting recommendations to suit the specific needs of law enforcement in this state.

As previously mentioned, the following recommendations fall into three distinct categories, which cover critical timeframes related to any officer-involved shooting or other use of force incident: pre-incident training and education; protocol during and immediately following an incident; and procedures utilized during the post-incident investigation and related to the ultimate disposition of a case.

A. Pre-Incident: Training and Education

Because officer-involved shootings require appropriate and timely response in the wake of traumatic events, it is critical that law enforcement agencies provide adequate training to personnel at all ranks in order to mitigate confusion and to attempt to prevent missteps in the immediate aftermath of an incident. Implementing sound policies and procedures not only provides clear guidance, it also prepares and protects officers carrying out their duties in good faith and maintains a measure of consistency and transparency in which the public can trust.

Recommendation 1: Every agency should develop and implement a clear policy on appropriate use of force, which includes a clear differentiation between a “show of force” and the “use of force” and clear parameters for the acceptable use of lethal and less-than-lethal force, respectively.

The President’s Task Force on 21st Century Policing (2015) contends that “[l]aw enforcement agencies should have comprehensive policies on the use of force that include trainings, investigations, prosecutions, data collection, and information sharing. These policies must be clear, concise, and openly available for public inspection” (p. 20).

In outlining what constitutes appropriate use of force on the part of an officer, agencies may consider citing to *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). The prevailing opinion in *Tennessee v. Garner*—focused on the constitutionality of utilizing deadly force to stop an apparently unarmed suspect—holds that “such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”

The prevailing opinion in *Graham v. Connor*—focused on the question of what constitutional standard applies to citizen claims of a law enforcement official’s excessive use of force during an arrest, investigatory stop, or seizure—holds that “such claims are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard”, 490 U.S. 386, 387.

Recommendation 2: Every agency should review its use of force and officer-involved shooting policies on an annual basis and make revisions, if necessary, based on indicators from data gathered at the agency level, changes in case law, and changes in best practices across the profession. Changes should ensure that policies remain up-to-date, responsive to agency and community needs, as well as and consistent with nationally accepted best practices.

Recommendation 3: Every agency should train all officers upon hire on use of force policies and procedures and mandate refresher courses for all personnel at least annually. Additionally, following any officer-involved shooting or other use of force incident involving an agency, a review of use of force policies and procedures should occur and a refresher training should be mandated for all personnel.

IACP (2016) contends that law enforcement agencies “should fully train all staff on the contents of policies and procedures to ensure they understand what is required of them...[o]fficers should be familiar not only with agency policies and procedures, but with their individual rights including the Law Enforcement Officer’s Bill of Rights (if applicable) and departmental rights and privileges that may be conferred” (p. 3).

Recommendation 4: Every agency should require officers to submit a written report each time they utilize their firearm as a show of force by pointing it at a subject, but not shooting. This documentation requirement need not apply to instances in which an officer unholsters his or her weapon and holds it at a low ready. Three agencies that submitted materials to the Subcommittee for this review already have so-called “show of force” policies in place. Many law enforcement agencies across the nation have implemented such policies in recent years as they have been shown to decrease the incidence of officer-involved gun deaths to a statistically significant degree (Jennings and Rubado, 2017).

Specifically, Jennings and Rubado (2017) note that “[p]olice agencies that require officers to file a report when they point their guns but do not shoot at civilians had significantly lower rates of gun deaths by police officers...[r]esearch suggests that the implicit recommendation from leadership of avoiding unnecessary gun draws, and a general commitment to best practices among agencies that have this policy have a deterrent effect” (pp. 217-18). Agency heads can help set the tone for their officers by supporting the utilization of show of force policies

B. Incident

Responding to officer-involved shootings is among the most difficult challenges law enforcement agencies face. As indicated in the previous section, the importance of robust training cannot be overstated, but despite agencies implementing sound policies, officer-involved shootings are not always avoidable. In the event of an officer-involved shooting, it is critical that every law enforcement agency stands ready to respond immediately and in compliance with its established policies and procedures.

The Subcommittee acknowledges that many New Mexico law enforcement agencies are small and located in rural areas. As a result, those agencies may not have the capacity nor the need to maintain a specialized investigative unit on a permanent basis. Regardless of the size of an agency, however, it is important that an

investigative plan be developed and implemented that either employs internal resources, or that relies on shared resources from a better resourced agency or agencies.

Many agencies that submitted materials to the Subcommittee already rely on New Mexico State Police to assist in response to officer-involved shootings, or collaborate with other agencies in order to do so. Regardless of approach, lack of development of an investigative plan or lack of adherence to a developed plan may result in an agency's inability to adequately demonstrate facts and circumstances related to an incident and/or may jeopardize the integrity of an incident investigation.

Recommendation 1: Every agency should develop a thorough investigation plan to respond to officer-involved shootings and other use of force incidents which reflects current national law enforcement standards and which is appropriate to the agency's jurisdiction. An investigative plan should account for elements including but not limited to: securing the scene of the incident; identifying and speaking with witnesses; making proper notifications; and preserving evidence. More in-depth information related to best practices in these and other areas can be found in recommendations from IACP (2016) and the President's Task Force (2015).

Recommendation 2: Every agency should develop and implement policies that clearly delineate the roles and responsibilities of all involved parties, including but not limited to: the officer involved in the primary incident; any officers who were present during or immediately following the incident; and all officers or other personnel with duties involving crime scene preservation and investigation.

Additionally, investigative plans implemented by agencies should clearly delineate between the administrative and criminal investigation of an incident. IACP (2016) notes that “[i]t is important that officers understand the differences between criminal and administrative investigations and their rights during each of these processes” (p. 3).

For smaller agencies that rely on assistance from other entities, an investigation plan should still be put in place that clearly outlines, in detail, protocol related to any agreement for assistance or collaboration. IACP (2016) acknowledges that “[o]utside agencies can play a role in addressing officer-involved shootings and assisting [law enforcement agencies] in investigating event[s]. It is advantageous to formulate relationships with...other criminal justice agencies, which can help ensure a smooth, thorough, unbiased, and impartial investigation[s]” (p. 3).

Recommendation 3: Regardless of an agency's ability to investigate incidents involving its own personnel, every agency should be prepared to request the assistance of an outside agency when a conflict is identified or when an agency concludes that its ability to complete its own investigation in an unbiased manner may be compromised. In this case, an agency should execute a formal memorandum of understanding (MOU) with an outside agency that is able to complete the

investigation and that has no conflict. Ideally, such agreements should be put in place prior to an incident and should be a standard part of an agency's response plan.

Specific to small agencies, IACP notes that they "may benefit from partnerships with larger agencies, including, as appropriate, sheriff's departments, state police, and state criminal investigative agencies. Agencies can formalize partnerships through memoranda of understanding that outline the ways in which the agencies will work together and share resources" (p. 5).

As asserted by the President's Task Force (2015), which contends that "policies should...mandate external and independent criminal investigations in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths" (p. 21).

Recommendation 4: Every agency should track data related to use of force, including an accounting of how many times officers report a show or use of force. This information should be gathered and analyzed on a quarterly basis, and should be used to inform agency leadership on the effectiveness of policies and training.

The President's Task Force (2015) which contends that "[p]olicies on use of force should require agencies to collect, maintain, and report data to the Federal Government on all officer-involved shooting, whether fatal or nonfatal, as well as any in-custody deaths" (p. 21).

C. Post Incident

An agency's responsibilities extend beyond training officers and providing sound policies and procedures for immediate incident response. Every agency should predetermine how it will handle important elements of incident aftermath, including officer care, public communication, and working with prosecuting agencies, if and when necessary. Each element of policy building should be undertaken with an eye toward transparency, thoroughness, and timeliness.

Recommendation 1: Each agency should designate a primary Public Information Officer (PIO) who is responsible for the development of a timeline for release of information to the public following an incident. The PIO should also be responsible for the concurrent release of information internally and externally related to an incident. Public communications should include as much information as possible without compromising the investigation. The PIO should be responsible for communicating any information related to the disposition of an investigation to the public.

According to the President's Task Force (2015), "[p]olicies on use of force should clearly state what types of information will be released, when, and in what situation, to maintain transparency...[t]his should also include procedures on the release of a

summary statement regarding the circumstances of the incident by the department as soon as possible within 24 hours" (p. 21)

IACP (2016) notes that a PIO "should be prepared to address critical incidents involving [a] department. Staff assigned to this role should be aware of the considerable sensitivities surrounding an officer-involved shooting and be prepared to provide consistent messaging throughout the incident and its aftermath" (p. 4).

Recommendation 2: Every agency should ensure that it works proactively to share information and collaborate with local district attorneys or other prosecuting agencies regarding procedures and expectations that will apply should an incident occur. These agencies should develop a written protocol which explains the different roles and expectations of these collaborations.

Recommendation 3: Agencies should provide appropriate aftercare services to any officer or personnel involved in an officer-involved shooting or other use of force incident. In addition, an agency should, at the least, remove any officer involved in an incident from the line of duty for a minimum of three days. That officer should be required to undergo counseling immediately following the incident and not return to normal duty until cleared by a counselor, psychologist or mental health professional.

Agencies should actively work to dispel both internal and public misperceptions that administrative leave following a critical incident is disciplinary in nature. Instead, agencies should reinforce the fact that administrative leave is required in order to protect the safety and welfare of the officer(s) involved and to maintain the integrity of any investigative efforts in the immediate aftermath of an incident.

IACP (2016) recommends that, "[i]n the immediate aftermath of a shooting, [a] department...place any officer involved on administrative leave pending counseling by an agency-designated mental health provider...[a]gencies should have a policy addressing mandatory leave, crafted in a way that accounts for variation in officer reaction...[i]t is important for officers and the public to understand that administrative leave is a routine procedure and not a disciplinary action" (p. 27).

IACP (2016) notes that "it is important to evaluate personnel [who have been involved in or present during an officer-involved shooting] in order to ensure that they can safely and effectively return to their typical work duties. Individuals determined to be experiencing extreme stress reactions should be placed on administrative leave and not be allowed to return directly to normal work duty assignments, even if they express a desire to do so" (p. 24).

Recommendation 4: Agencies should focus on completing investigations of officer-involved shootings and other use of force incidents in a thorough and timely manner. The timely completion of an investigation is not only in the best interest of the public, but also of the family of the victim. Additionally, timely investigations ensure that

involved officers can either be appropriately sanctioned or exonerated as quickly as practicable.

VI. Conclusion

There is a great deal that goes into the development of sound policies and procedures governing officer-involved shootings and other use of force incidents. Law enforcement agencies face many challenges, among them balancing officer and public safety, thoroughly training officers, keeping policies up-to-date, and maintaining an appropriate degree of transparency while undertaking investigations.

The Subcommittee recognizes these challenges and is hopeful that agencies across the state will take the opportunity to evaluate current policies and procedures and look for ways to improve, as necessary.

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